

Chapter 7

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Ownership rhetoric and the question of belonging

Abstract

50 years ago, in *Pettitt v Pettitt*, Lord Diplock famously confirmed the emergence of a 'property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy' (824) in post-war Britain. This chapter takes this statement as the departure point for demonstrating how ownership rhetoric and the ideological commitment to private home-ownership has informed decades of development in housing policy. After providing an overview of the approach successive governments have taken to housing policy, which combined to create quite a problematic outlook for the public provision of homes, the chapter turns its attention to the recent case of *Z v Hackney LBC and Anor*. That case exemplifies the difficulties wrought by the public housing environment, compounded as they are by a rights framework which gives little weight to the matter of considerable, but perhaps more nebulous, socio-economic rights. The chapter argues that this presents problems for geographical and political senses of belonging.

1. Introduction

It has been 50 years since *Pettitt v Pettitt*¹ and, more specifically, since Lord Diplock famously confirmed the emergence of a 'property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy' (824) in post-war Britain. Given that this chapter sits in a collection of essays reflecting on '50 years of law', Lord Diplock's statement seems a suitable starting point for reflection. The rhetorical stress placed on ownership will be interrogated with particular consideration given to the effect on senses of belonging. More specifically, what does the rhetorical emphasis on the importance of owning real property as a condition of political participation mean in relation to belonging within a community? Additionally, what effect has the symbolic value of property ownership had on the law within the last 50 years and, correspondingly, what role can and should law play in committing to upholding senses of belonging? The context in which these questions are asked is housing law and policy; hence it was mentioned above that the *phrase* is worth reflecting on, rather than the judgment itself, as it neatly encapsulates shifts in attitudes towards council housing, redefinitions of 'the social', and the increasing individualisation and privatisation of responsibility within this realm.

In other words, this chapter explores the effect the emphasis on the value of property ownership has had on social policy, legal frameworks, and the belonging of people within a political community. In order to do this, section one establishes a brief account of certain developments in housing law and related policy within the last 50 years. Section two builds on this by considering how such developments inevitably traverse questions relating to precarity, necessity, and belonging. Moreover, the current climate of public housing provision means that the discharge of local authority duties to house people often cuts across people's senses of place, familiarity, and home. The rhetorical focus on property ownership, and on the value

¹ *Pettitt v Pettitt* [1970] AC 777.

of aspiring to own, is woven into this issue. Indeed, the division between haves and have-nots in this regard has become much more apparent, with wealth disparity more dramatically symbolised in, and affected by, access to real property. Moreover, it could be argued that insecure relationships to housing are racialised and xenophobic, given that housing precarity is more likely to lead to exposure to other ideologically driven policy initiatives which disproportionately affect BAME and migrant persons within communities.²

As such, housing precarity becomes one means by which exclusions from political communities are demarcated, and law is bound up in this process. Indeed, this chapter demonstrates, in section three, that housing precarity is cemented by other legal provisions and exhibits the distinct lack of importance within the liberal rights paradigm of textured and relational socio-economic conditions for inclusion. In making this argument the focus is on a consideration of *R (Z & Anor) v Hackney LBC and Anor (Z v Hackney and AIHA)*,³ subsequently confirmed in the Court of Appeal, which concerned a mother and her children in need of housing within the London Borough of Hackney and the question of reasonable exceptions to the duty not to discriminate when deciding who can and should be housed. Housing precarity was substantiated in the process by which the material need to be housed was made, in effect, peripheral to the justiciable issues at hand.

With a focus on various provisions of the Equality Act 2010, the central argument for this chapter is that the rights framework that it relies upon can compound the diminished senses of belonging felt by those experiencing housing precarity. As an aspect of this argument, I suggest *Z v Hackney and AIHA* exemplifies the need for a duty to consider socio-economic rights to be introduced and factored into legal decision making, including committing to considering belonging as an important objective of law.⁴ Within the challenging climate for public housing provision, such a duty to recognise and consider socio-economic rights is, it is argued, a very modest but significant step in satisfying both geographical and political senses of belonging.

2. Ideological and legislative backdrop

The story of housing provision, policy, and need is one of fluctuation, tension, and contingency on political and economic pressures.⁵ For instance, the speed and quantity of local authority housing built in the post-war era was also characterised by high-volume tower blocks which were poorly received. As such, council housing was widely disparaged, and the 1970s heralded the unpopularity and negative image of housing provided by the council.⁶ Whilst it is true that the provision of housing could be characterised by problems long before the 1970s, just as the desire for a property owning democracy was extant long before *Pettitt*,⁷ rapid and fundamental changes in relation to housing ideology and policy have occurred within the last 50 years and invite particular attention.

² Sarah Keenan (2018) 'A prison around your ankle and a border in every street: theorising law, space, and the subject' in Philippopoulos-Mihalopoulos, A (ed) *Routledge handbook of law and theory*. Abingdon: Routledge; Smith, D (2019) 'The Immigration Act 2014 and the Right to Rent' in Prabhat, D (ed) *Citizenship in times of turmoil?: theory, practice and policy*. Cheltenham: Edward Elgar.

³ *R (Z & Anor) v Hackney LBC and Anor* [2019] EWHC 139.

⁴ A public sector duty to consider socio-economic rights is provided for in section 1 of the Equality Act 2010. However, successive governments have refused to bring this provision into force, as required by section 216(3).

⁵ David Cowan and Morag McDermont (2006) *Regulating social housing: governing decline*. Abingdon: Cavendish.

⁶ *Ibid.*

⁷ Ben Jackson (2012) 'Property owning democracy: a short history' in O'Neill, M, and Williamson, T (eds) *Property-owning democracy: Rawls and beyond*. Oxford: Blackwell.

One early milestone was the enactment of the Housing Act 1974.⁸ This provided for Housing Association Grants, financing any gap between the cost of a scheme and the income housing associations received in rental income. This, alongside income grants which were available should a scheme subsequently have a revenue deficit, effectively meant housing associations were state guaranteed.⁹ The effect of Housing Association Grants was the reduction of *direct* public sector participation in the provision of housing,¹⁰ notwithstanding the financial guarantees the scheme provided.

By the late 1970s, identifying owner-occupation as a desirable policy objective had taken hold in the Labour Party¹¹ drawing it into closer convergence with the values held, perhaps less surprisingly, by the Conservative Party.¹² When the Conservatives, led by Margaret Thatcher, came to power in 1979, they brought with them an ideology of reduced state involvement in the provision of social services, the rhetoric of individualised and privatised responsibility, and a conceptualisation of inequality as a necessity for a functioning economy. A commitment to the 're-commodification of housing'¹³ followed. As a result, The Housing Act 1980 provided for the right of secure tenants to acquire the freehold of houses, or long-lease of flats, at an exceptionally discounted rate. The immediate effect of this policy was that it enabled those who were in a position to afford to purchase their council homes to do so. It also left those unable to afford to purchase their homes continuing to pay rent, and rent which no longer needed to satisfy the "no-profit rule" provided by the Housing Rents and Subsidies Act 1975, as this was repealed by the Housing Act 1980; local authorities were effectively then pressurised to increase rents to offset parallel reductions in funding from central government.¹⁴ In other words, the Housing Act 1980 exemplified the inequality necessary to satisfy the commitment to a smaller state and privatisation. Furthermore, the longer-term implication of the right to buy policy was the significant reduction in local authority-controlled housing units.

Moreover, the concern of Thatcher's conservative government with reducing state expenditure on the provision of public services, whether provided directly or indirectly by the state, led to a curtailment of the level of funding made available via the Housing Association Grant. This created an unfavourable environment¹⁵ for many housing associations¹⁶ and demonstrated that, whilst not a 'political football',¹⁷ housing policy was fundamentally affected by the whims of changing governments and ideologies.¹⁸ Because, since 1979, the ideology of a radically smaller state has guided successive governments into a particular direction of travel and a general consensus over housing policy,¹⁹ we can look back on the Housing Association Grant

⁸ Peter Malpass (2000), *Housing Associations and housing policy: a historical perspective*. Basingstoke: Macmillan.

⁹ David Cowan (2011) *Housing law and policy*. Cambridge: Cambridge University Press.

¹⁰ Nick Gallent (1998) 'Local housing agencies in rural Wales' 13(1) *Housing studies* 59.

¹¹ Anne Power (1993) *Hovels to highrise: state housing in Europe since 1950*. London: Routledge.

¹² The 1970s also heralded a growing consensus about the approach that needed to be taken in relation to housing policy, and a desire held by both Labour and Conservatives to diversify housing provision away from reliance on local authorities (Malpass 2000).

¹³ Ray Hudson (2013) 'Thatcherism and its geographical legacies: the new map of socio-spatial inequality in the Divided Kingdom' 179(4) *The geographical journal* 377, 379.

¹⁴ See Elizabeth Roistacher (1984) 'A tale of two conservatives: housing policy under Reagan and Thatcher' 50(4) *Journal of the American planning association* 485.

¹⁵ An environment which, in subsequent years, would become incrementally more unfavourable (Jacqueline Smith and Michael Oxley (1997) 'Housing investment and social housing: European comparisons' 12(4) *Housing studies* 489; Michael Oxley (1999) 'Institutional structure of social housing finance in the UK: recent developments' 36(4) *Urban studies* 673).

¹⁶ Gallent (n 10).

¹⁷ Malpass (n 8), 157 et seq.

¹⁸ Though, arguably, Labour and Conservative were not, historically, dogmatic about ideologies and attitudes to government and avoided extreme shifts from an albeit fairly value laden idea of 'traditional orthodoxy and market forces' (see eg Ian Gilmour (1992) *Dancing with dogma: Britain under Thatcherism*. London: Simon & Schuster, 9).

¹⁹ Morag McDermont (2010) *Governing independence and expertise: the business of housing associations*. Oxford: Hart.

and the practical effects it had on the provision of housing with renewed understanding of its significance. In other words, the function of the Housing Association Grant was to ensure that local authorities were encouraged to rely upon housing associations for the provision of social housing. Following the election of a government determined to cut public expenditure on the provision of social service in 1979, the Housing Association Grant also functioned to put housing associations in the firing line.

2.1 1979 and beyond

While the section above demonstrates a convergence of approaches between the two main parties in the 1970s in relation to housing, and touches upon the effects of the Housing Act 1980, this section's distinction between pre-1979 and post-1979 is made on the basis of a sharp ideological difference between these political eras. From 1979, there has been an accelerated effort to reduce public expenditure, encourage private investment in the provision of public services, and the exposure of public service providers to market risk.²⁰ Alongside this, there was a significant shift in rhetoric surrounding the expectations citizens could, and should, have of the provision of public services; a change in how 'good' citizenry was characterised; a mobilisation of rhetoric suggesting public services were a contributory factor to social ills;²¹ and a desire to limit strength and opposition at local government level. Each of these features of a particular ideology, in one way or another, has contributed to the housing context in which this chapter's analysis of *Z v Hackney and AIHA* sits. The Housing Acts of 1980, 1988, and 1996, and the Housing and Planning Act 2016 each contribute to the story of tenant acquisition of council housing, transfers of social housing stock from local authorities to housing associations, and compelling housing associations to seek private finance, thus exposing them to increased risk while also providing for a greater ability to acquire council housing stock.

In the short-term, the immediate impact of the Housing Act 1980 was that it ensured that the majority of tenants in council houses had a right to buy their homes. This provision was reinforced by ministerial pressure being put on local authorities who refused to cooperate with the statutory right to buy;²² before this point, the right of tenants to buy their council properties had been something that councils could freely disregard. The result was an extraordinary acceleration of the sale of council housing. Between 1980 and 1985, 643,000 homes were sold, tripling the sales of council housing that had occurred throughout the 1950s, 1960s, and 1970s combined.²³ While popular, 'ideology obstructed common sense'²⁴ and the combination of the right to buy with the ideological commitment to market reliance for the provision of public services, alongside reducing the capacity and powers of local authorities, prevented any reinvestment of the proceeds of right-to-buy sales in the building of more council housing stock.

As such, the percentage of housing provided by local authorities fell from 32 percent in 1979 to less than 25 percent within less than 10 years.²⁵ Indeed, in the longer term, owner occupation rose considerably, and local authority housing provision in Great Britain has now fallen to just over a quarter of what it was in 1981.²⁶ While conservative authors might identify this as significant statistical support for the argument that the right to buy policy is a success,²⁷ it undeniably contributed to the weakening of the capacity of local authorities to respond to

²⁰ See eg David Harvey (2005) *A brief history of neoliberalism*. Oxford: Oxford University Press.

²¹ Paul Garrett (2015) 'Words matter: deconstructing "welfare dependency" in the UK' 3(3) *Critical and radical social work* 389.

²² Gilmour (n 18).

²³ David Mullins and Alan Murie (2006) *Housing policy in the UK*. Basingstoke: Palgrave Macmillan, 95.

²⁴ Gilmour (n 18), 144.

²⁵ Malpass (n 8).

²⁶ Mark Stephens et al (2019) *UK housing review*. Coventry: Chartered Institute of Housing.

²⁷ Peter King (2010) *Housing policy transformed: the right to buy and the desire to own*. Bristol: Policy Press.

housing needs. Perhaps more significant, particularly in relation to the later focus of this chapter, is the substantial rise in the proportion of housing association dwellings in Great Britain; there are over four and a half times more now than there were in 1981.²⁸ This rise is a result of steady increases in property acquisition and building across the last 40 years. Within that time, there have been a number of key policies and legislative enactments that have needed to be responded to. The most significant of these are the provision for stock transfers and the Housing Act 1988.

The Housing Act 1988 is perhaps the piece of legislation which best symbolises the Thatcher government's approach to housing. This chapter has already touched upon the reduction in direct local authority provision of housing in favour of housing association provision, in response to the Housing Act 1974 and the benefits of the government grants that could be awarded to encourage housing association development. However, the expansion of housing associations in the 1980s was also matched by an increased anxiety among housing associations that the regime of Housing Association Grants to fund the costs of housing association builds 'could not survive the assaults on public spending of the Thatcher administration. [Indeed], during the mid-1980s, associations and the Housing Corporation could see that public funding to associations would not continue at the level they had become used to'.²⁹ The 1988 Housing Act was the legislative realisation of these concerns. It introduced the need for housing associations to shoulder the risk of more autonomy and more exposure to private finance and the housing market as opposed to being guaranteed by state support (Bramley 1993).³⁰

The effect of this shift in emphasis was that housing associations were not constrained by public finance spending rules; a larger proportion of their funding now came from private investment. This meant housing associations were less restricted in terms of spending power, meaning that more money could be spent on acquiring housing stock. This accelerated Large-Scale Voluntary Transfers, the means by which local authorities could divest themselves of council housing stock, with some divesting themselves of nearly all, or sometimes all, of their stock. Moreover, the Housing Act 1996 provided for an additional diversity of bodies—including companies which were not registered societies or charities³¹—who were eligible to register as social landlords and access Social Housing Grants (replacing Housing Association Grants). In relation to non-local authority sources of housing, the 1988 Act set in motion fewer constraints on how housing associations managed dwellings within their portfolios, including enabling the sale, lease, or shared-ownership sale of dwellings. This continued under the 1996 Act, demonstrating that the new funding environment for housing associations was also coupled with a continued commitment to basing housing policy on the core value of homeownership, or at least simulations thereof.³²

Within such a public housing context—emphasising as it does the importance of diversification of housing providers, the diminishing stock of local authority housing, and the emphasis on enabling social housing tenants to eventually own their own homes³³—it is important to stress the impact this inevitably has on a local authority's ability to adequately and directly discharge any obligations to accommodate. The local authority's duty to accommodate is provided for in

²⁸ Stephens et al (n 26).

²⁹ Cowan and McDermont (n 5), 91. See also McDermont (n 19).

³⁰ Glen Bramley (1993) 'Quasi-markets and social housing' in Le Grand, J, and Bartlett, W (eds) *Quasi-markets and social policy*. Basingstoke: Macmillan.

³¹ They still needed to satisfy a non-profit making criterion in order to be eligible for registration, a condition which was removed by the last Labour government via s.115 of the Housing and Regeneration Act 2008.

³² While not the focus of this chapter, it is important to emphasise the implications of the 1988 Act for rent controls and affordability: the increased risk placed on housing associations, and the increased autonomy they enjoyed was also coupled with the fact that new tenancies granted by providers of social housing would be free from statutory control over rents being charged.

³³ Compounded by the extension of the right to buy to social landlords provided for by the Housing and Planning Act 2016.

the Housing Act 1996, as amended, as being discharged through nominations of persons to be assured tenants to accommodation held by private registered providers of social housing or registered social landlords.³⁴ Such nominations must be made on the basis of local authority allocation schemes which outline how priorities are defined and the process by which accommodation is allocated.³⁵ However, the local authority management of allocations, and the discretion local authorities possess in the course of making allocations,³⁶ have been hampered by the continual depletion of available housing during the last 40 years. Moreover, local authorities have little access to resources, financial or otherwise, to replenish stock and are compelled to sell off additional stock to fund the widening of the right to buy for housing association tenants.³⁷

3. Housing and precarity

Within this legislative and policy context, a key question to reflect on is: what does this legal context mean for people? The above plotting of housing legislation milestones within the last 50 years confirms that the focus of post-1979 governments was to diminish the role of local authorities in relation to housing as much as possible. Such an aim originates from the same place as the value placed on homeownership. Indeed, Thatcher's 'program of politico-ideological war against . . . general notions of social democracy and corporatist or civic belonging', continued by successive governments, 'drove her to transform the world into a place where . . . "there is no society, only individuals"'.³⁸ The policy shift from society to individuals can readily be brought back to the idea of the privatisation of responsibility, where homeownership is rhetorically framed as an economic necessity and a source of security, and where non-ownership is cast into the rhetorical framing of responsibility for overcoming need and securing provision as being one's own.

Law is a means through which to achieve this; the manifestation of, for instance, the statutory right to buy satisfies a yearning to promote ownership and also becomes the basis on which non-owners are exteriorised. The legislative provision of the right to buy, and the unequivocal value placed on ownership as '*the goal of UK housing policy*',³⁹ can be pointed to as the methods by which the 'good' homeownership can be extended to others. In parallel, it contributes to the mobilisation of an equivalent suggestion that the precarity people experience as non-owners is just deserts for not conforming to the self-reliance ostensibly enabled by ownership. This resonates with the common refrain of neoliberal governments that dependency on welfare and other public services designed to relieve poverty have the effect of maintaining it.⁴⁰ In other words, housing policy both reasserts a supposed 'psychological and social superiority of homeownership'⁴¹ and rationalises the abdication of state responsibility for housing provision in moralistic rhetoric about the ills of reliance on public services.

None of the above disregards the fact that the rhetorical stress on homeownership has also led to an increased sense of precarity and anxiety among homeowners, too. Indeed, the

³⁴ s.159.

³⁵ s.166A.

³⁶ See Emma Laurie (2011) 'Filling the accountability gap in housing allocations decision making' 31(3) *Legal studies* 442.

³⁷ Chris Bevan and Emma Laurie (2017) 'The housing and planning act 2016: rewarding the aspiration of homeownership?' 80(4) *Modern law review* 661.

³⁸ Anthony Marcus (2006) *Where have all the homeless gone?: the making and unmaking of a crisis*. Oxford: Berghahn Books, 140.

³⁹ David Cowan, Helen Carr, and Alison Wallace (2018) *Ownership, narrative, things*. Basingstoke: Palgrave Macmillan, 8.

⁴⁰ See eg Kesia Reeve (2015) 'Criminalising the poor: squatting, homelessness and social welfare' in Fox O'Mahony, L, O'Mahony, D, and Hickey, R (eds) *Moral rhetoric and the criminalisation of squatting: vulnerable Demons?* Abingdon: Routledge.

⁴¹ David Madden and Peter Marcuse (2016) *In defense of housing*. London: Verso, 41.

promotion and promise of property ownership often translates to the reality of debt secured against property and consequential financial precarity, with the rhetoric of personal responsibility personified by the practice of high personal risk. In other words, 'ownership is no guarantee of stability . . . [but] a route to catastrophe'.⁴² This potential is encapsulated in Lord Diplock's significant caveat of not just a property-owning democracy but a 'real-property-mortgaged-to-a-building-society-owning democracy'.⁴³ Moreover, the emphasis on diminishing the state provision of housing, encapsulated in the 'right to buy' policy and in stock transfers of council housing to housing associations, creates a complex picture for those in blocks of flats as their desire to own their own local authority home may be bound by contingency and precarity as their status is as leaseholders rather than freeholders.⁴⁴

Notwithstanding this, there is a particular insecurity experienced by non-owners,⁴⁵ and it is an insecurity brought on by the rhetorical insistence on ownership which draws privatisation into line with civic virtue and citizenship.⁴⁶ The significant changes to the housing market and policy relating to public housing provision invite us to think through questions of precarity and belonging, particularly given the subject matter of *Z v Hackney and AIHA* discussed in the following section. We have seen that the stress on ownership as the ideal way in which people relate to their homes and communities has created an overriding focus on housing and economic policies which encourage homeownership⁴⁷ while also diminishing the effectiveness and availability of affordable social housing options. This has, ultimately, been compounded by the deregulation of the private rental sector.⁴⁸ The stress on ownership, then, precipitates a stress on people who are unable to own and are, thus, left either facing a private rental sector which is 'liberalised' from various forms of tenant protection or navigating social housing options which have gone through an accelerated period of decoupling from direct and democratic local authority control.

3.1 Home, place, and belonging

The stress identified above in relation to housing need is an aspect of ontological insecurity,⁴⁹ in which feelings of safety, of degrees of isolation or alienation, and of financial security are entangled with the housing market and gradations of housing tenure. In other words, security is rooted in suitable housing, while housing inadequacy and/or inaccessibility precipitates insecurity. Given that shelter, and security thereof, is a basic need, and that the sustained ideological shift in housing which casts ownership as responsible and an indication of good citizenship, this idea of insecurity can be encapsulated in Hannah Arendt's idea that 'necessity is primarily a prepolitical phenomenon',⁵⁰ where matters relating to the maintenance of life come before the capacity for political participation. Of course, as has been addressed above, homeownership does not immediately and automatically correspond to security. However, the commitment to the privatisation and individualisation of responsibility in relation to housing has been at the expense of those unable to own, and especially those in need of state support.

⁴² *Id.*, 77.

⁴³ Although, of course, it is now more accurately 'mortgaged-to-a-bank' because most building societies have demutualised.

⁴⁴ See Helen Carr (2011) 'The right to buy, the leaseholder, and the impoverishment of ownership' 38(4) *Journal of law and society* 519. See also Cowan, Carr, and Wallace (n 39) for an indication of how an illusion of 'ownership' can also elide the complexity and potential insecurity of shared ownership as a housing option.

⁴⁵ Indeed, the principle underlined in *Pettitt* is that, short of establishing intentions to the contrary, non-proprietors within the family home can find it difficult to establish a beneficial interest in the property, notwithstanding contributions they may have made. As such, even in the idealised context of the privately-owned family home, the precarity of non-ownership is also evident.

⁴⁶ Lennart Lundqvist (1998) 'Property owning and democracy—do the twain ever meet?' 13(2) *Housing studies* 217.

⁴⁷ Madden and Marcuse (n 41).

⁴⁸ Mullins and Murie (n 23).

⁴⁹ See Madden and Marcuse (n 41).

⁵⁰ Hannah Arendt (1998) *The human condition*. London: University of Chicago Press, 31.

Arendt's idea resonates here not only because it suggests that a preoccupation with need is politically incapacitating, but one could also say it unintentionally and ironically captures the moralistic notion, which has been established as central to the neoliberal ideology, that those in need are political pariahs, too.

While Arendt's understanding of necessity limiting political capability and the capacity to participate within public life is primarily exemplified by political organisation in Ancient Greece, the tenor of this idea is equally applicable to contemporary questions relating to the entanglement of socio-economic status, material need, and political consciousness in Britain. In other words, while her consideration of political freedom afforded to those who liberated themselves from necessity by ruling over slaves is not wholly relevant, the idea of the tension between need and political freedom is. Moreover, expressly in relation to the home, Arendt contends that, 'without owning a house, a man could not participate in the affairs of the world because he had no location in which it was properly his own';⁵¹ it could be argued that not much has changed. Such a point about the importance of rootedness and a sense of place for political inclusion is echoed by Louise Du Toit, who argues that 'home, belonging, having a sense of identity, is a prerequisite for participation (speaking and being heard) and for occupying a place in the public-political domain'.⁵² The importance of establishing 'home' for realising a sense of self is far more substantive than the importance of shelter. It includes what is encapsulated in 'home'—boundedness, security, and 'access to a time that accommodates a rhythm for one's becoming'⁵³—is still *necessary*.

If home is a prepolitical necessity, then the limitation of conditions in which the home is accessible, are limitations of inclusion within the political realm which are reinforced by law. Such a limitation also emerges in the narrative distinction made between private and public housing where, for instance, there is an emphasis on private *home*ownership and the less emotive language to describe other tenures.⁵⁴ In the context of necessity as a prepolitical phenomenon, the liberal rights and equalities framework is insufficient to tackle the social and political imperative of attachments and belongings. Furthermore, the neoliberal acceleration of liberal individualism (ie individualisation of responsibility and associated moralisation about failures to take responsibility so defined) means that the rights, freedoms, and equalities deemed important for access to political security are conditioned by, and subsequently entrench, an overarching liberal paradigm.

Indeed, the very notion of a property-owning democracy commits us to imagining political engagement being conditional on responsible private ownership. The story of housing law being the commitment to offering the 'right to buy' elides the importance of a 'right' to be(-long and -come). The following sections give an indication of where the direction of travel in housing law and policy traverses a rights framework which is not textured, responsive, or appreciative of relationality.⁵⁵ They seek to, first, demonstrate this intersection through a consideration of *Z v Hackney and AIHA*. Second, the capacity for a modest move towards incorporating more location- and belonging-responsive considerations into housing policy and judgments is reflected upon, whereby access to the public-political domain is not contingent on narrow

⁵¹ *Id.*, 29-30.

⁵² Louise Du Toit (2007) 'Feminism and the ethics of reconciliation' in Veitch, S (ed) *Law and the Politics of Reconciliation*. Aldershot: Ashgate, 211.

⁵³ *Ibid.*

⁵⁴ Craig Gurney (1999) 'Pride and prejudice: discourses of normalisation in public and private accounts of home ownership' 14(2) *Housing studies* 163.

⁵⁵ Bal Sokhi-Bulley (2019) 'Rights as a distraction from "belonging": a response to the Shamima Begum ruling'. 28 May 2019. *Critical Legal Thinking*. <http://criticallegalthinking.com/2019/05/28/rights-as-a-distraction-from-belonging-a-response-to-the-shamima-begum-ruling/>. Accessed 28 February 2020. Sokhi-Bulley writes, here, in response to questions of citizenship, rights, and belonging surrounding the revocation of Shamima Begum's British citizenship. However, this work critiques the limiting and limited nature of rights, and invites us to consider an ethic of more substantive 'rights' as a condition of belonging and response-ability.

definitions of 'home' but is brought into conversation with the right to 'home' and the right to belong.

4. Z, competing needs, and the question of equality

In the first section of this chapter, a brief overview of the policy and legislative context surrounding housing law was given. This section now turns to demonstrating how various policy objectives and implementations have manifested themselves in relation to local authority housing obligations. The case of *Z v Hackney and AIHA*⁵⁶ offers a good example of the accumulated effect of housing policy over the last few decades, in that the contribution of Hackney London Borough Council to this case is determined by the reliance on housing association provision, by the reduction of local authority controlled housing stock, and by the continual lack of (re)investment of funds in council housing stock since the 1980s. This case also epitomises how developments in housing policy have led to a change in people's access to senses of place and belonging within a local community. Furthermore, it is argued that this case exemplifies the importance of establishing a rights paradigm which incorporates socio-economic rights in the pursuit of preserving the rights of people to belong.

This case concerns the housing needs of a mother (Z) and her four children. In 2017, Hackney LBC was ordered to house Z and her children in a property in a safe and risk-free environment, taking into account her specific housing needs relating to her two sons' autism. Indeed, the judgment of Lord Justice Lindblom and Sir Kenneth Parker acknowledge that an appropriate property, in response to Z's children's needs, would be defined by the satisfaction of a number of material criteria, including separate bedrooms for the children, single-level ground floor accommodation with an enclosed outdoor space, and access to reserved parking. Moreover, appropriateness was also defined in relation to proximity to the vital familial support offered by Z's mother who lived locally.⁵⁷ Additionally, Z's familiarity with the area, having lived in Stamford Hill her whole life, means that the need for appropriate housing to support her family dovetailed with her sense of being at home in the local community.

The issue at hand in this case arose from the fact that all properties suitable for Z and her family within Stamford Hill were owned by Agudas Israel Housing Association (AIHA). Established in 1981, the AIHA is a housing association whose principal objective is to provide affordable housing for the Orthodox Jewish community. Moreover, the nature and location of the accommodation provided for by AIHA responds to the religious and community requirements of observant Haredim which cannot satisfactorily be met through other housing provision. The focus of AIHA provision in the Stamford Hill area of Hackney corresponds with the large Hasidic Haredi Jewish community in the area. Z and her family are not Haredi Jews and, as such, Hackney LBC did not nominate Z for allocation to any of the six AIHA properties which fitted Z's criteria. The decision in *Z v Hackney and AIHA* had to contend, therefore, with both the needs of Z and her family as well as the community imperative of Haredi Jews.

The judgment considered 'the commitment and need of members of the Orthodox Jewish community to remain geographically proximate to that community, even if that means foregoing improved living conditions, bigger houses, or proper housing at all' and that 'the attachment to specific locations is not a question of convenience but effectively reflective of a way of life and community.'⁵⁸ As such, the strength of place and community belonging necessitates the provision of social housing to mitigate the social disadvantages faced by those in the Orthodox Jewish community. While this is understandable, it is also

⁵⁶ This chapter primarily examines the Divisional Court case and decision, as the Court of Appeal confirms the judgment (with expansion on the related question of proportionality). As such, paragraph references in the following text relate to the Divisional Court judgment unless otherwise stated.

⁵⁷ See [38].

⁵⁸ From Micah Gold, in reference to a focus group representing various Jewish communities in response to a report on the housing needs of the Jewish population in London. Quoted at [34].

understandable that Z and her family felt equally strong familial, social, and practical ties with Stamford Hill and they too had profound material needs in relation to housing. On the one hand, material need is elicited by the strength of community attachment and, on the other hand, community attachment is contingent on material need, such is the manifold texture of the relationship of home and belonging.

The legislative and policy context runs through this case and, indeed, the judgment itself confirms that 'social housing is under severe pressure in Hackney, as elsewhere in the country. There has been a rise in the private sector, a decline in owner occupation, increasing demand for social housing as well as dramatic cuts in central government funding'.⁵⁹ The fact that this rueful passage precedes, obviously, the judgment in favour of one of two parties encapsulates the precarity of non-homeowners. The ideological commitment to the privatisation of housing, and the corresponding limitations on appropriate levels of council housing, lead to indeterminacy in relation to the local authority, too. The social housing environments find local authorities in positions where they must rely upon registered social landlords when discharging their housing obligations⁶⁰ with 'no legal right or power, even if [they] were so minded, to insist that [a registered social landlord] jettison its lawful arrangements and to make allocation decisions without regard to those arrangements'.⁶¹ The uncertainty faced by concerned parties within the context of housing allocation is perfectly exhibited in *Z v Hackney and AIHA*, where the determinations on questions of housing need, and of the lawfulness of the conduct of a registered social landlord, are deferred to the realm of the Equality Act 2010.

4.1 The matter of discrimination

Perhaps the most widely understood aspect of the Equality Act 2010 is the consolidation of numerous pieces of anti-discrimination law, revolving around protected characteristics. Alongside, for example, age, race, sex, and sexual orientation, section 4 of the Equality Act 2010 provides that religion and belief are to be considered protected characteristics. Following this outline the Equality Act 2010 establishes how and when discrimination based on protected characteristics is unlawful; section 13 of the Equality Act 2010 defines discrimination as any instance where, 'because of a protected characteristic, A treats B less favourably than A treats or would treat others.' Importantly, in the context of *Z v Hackney and AIHA*, this also captures favourable treatment of parties because of their protected characteristic(s). As such, the argument presented by Z's counsel was that AIHA had discriminated against Z and her family on the basis that they were not members of the Haredi community.

Furthermore, section 29 of the Equality Act 2010 provides that anyone 'concerned with the provision of a service to the public or a section of the public . . . must not discriminate [on the basis of protected characteristics] against a person requiring the service by not providing the person with the service.' As the local authority responsible for managing housing allocations for those eligible for assistance, under a scheme which relies upon agreements with registered social landlords in order for it to make nominations to them in lieu of its own properties, Hackney was providing a service within the meaning of the Equality Act 2010. As such, its unwillingness to nominate Z for a suitable AIHA property was argued by Z's counsel to contravene section 29, as was AIHA's positive discrimination in favour of the Orthodox Jewish community as an organisation exercising a public function.

The counterarguments of Hackney and AIHA depended upon exceptions included in the Equality Act 2010 which have the effect of rendering some discrimination lawful. Section 158(2) provides that the Equality Act 2010 does not prohibit a person or organisation from

⁵⁹ See [19].

⁶⁰ Provided for by s.159(c) Housing Act 1996.

⁶¹ Quoted at [114].

taking action which seeks to overcome or minimise a disadvantage connected to protected characteristics. Moreover, section 193 of the Equality Act 2010 provides that, so long as restricting benefits to persons who share a protected characteristic is a proportionate means of achieving a legitimate aim, then a charity is not in contravention of the Act. As such, AIHA argued both that the positive action they were taking in relation to the provision of housing was necessary in relation to the disadvantages faced by members of the Orthodox Jewish community, and that, as a charity, AIHA's principal purpose to provide housing for Orthodox Jews was, in any case, permissible under section 193.

The Divisional Court agreed with AIHA, deciding that they were not in contravention of the Equality Act 2010 and, because their policy was determined to be lawful, neither were Hackney as they could not compel a co-operating housing association to dismiss their own lawful arrangements. The Court acknowledged the substantial challenges faced by members of the Orthodox Jewish community both in the observance of their faith, and also in relation to antisemitic violence and the very real senses of unbelonging felt by Orthodox Jews when living within mixed communities.⁶² As such, the preferential treatment of a group on the basis of a protected characteristic under the Equality Act 2010 was not a sufficient ground for Z to seek a review of the housing decision concerning her and her children. This was confirmed by the Court of Appeal. Notwithstanding an outstanding appeal to the Supreme Court, this case raises a number of points relating to the context in which housing decisions are made, the extent to which certain rights are protected over others, and questions about the importance of community and placeness bound up in a speculative right to belong.

4.2 Extending the rights landscape

The preceding text, journeying through various legislative milestones, was an essential part of setting a particular scene. Similarly, the use of *Z v Hackney and AIHA* has exemplified the tensions which can arise when vulnerable people have to navigate a housing system characterised by the distribution of responsibilities to housing associations which might each have their own distinct pressures and purposes that conflict with the needs of those who require accommodation. Each of the sections above is effectively preamble to a wish which is unlikely to come true anytime soon: that wider questions of socio-economic rights are more vigorously bound up in decisions relating to, among other things, housing.

The question for this section is, however, not *necessarily* what effect any enactment of the duty to have regard to socio-economic inequalities would have on a decision such as *Z v Hackney and AIHA*. Rather, it is to establish how questions relating to belonging, geographical attachment, and familiarity would feature in various decision-making processes relating to the provision of services, while also underlining the fundamental problems with the public housing climate. In other words, this chapter does not suggest that the enactment of section 1 of the Equality Act 2010 would have led to a successful claim for judicial review in *Z v Hackney and AIHA*. Indeed, such a decision, grounded in the legislative and principled imperative to act positively to alleviate disadvantages faced by certain groups, is sound. However, a public duty to give due regard to reducing socio-economic disadvantage would mean that a local authority's approach to, for instance, housing would be justiciable.

Scotland, as the only nation within the United Kingdom to have introduced such a public sector duty,⁶³ gives an example of how the duty to give due regard to reducing socio-economic disadvantage can be defined. Guidance produced in advance of the April 2018 introduction of the duty obligates public bodies to 'actively consider, at an appropriate level, what more they can do to reduce the inequalities of outcome, caused by socio-economic disadvantage, in any

⁶² See [33].

⁶³ The Welsh Government have recently (in January 2020) closed a consultation on how to deliver a socio-economic duty in relation to Wales.

strategic decision-making or policy development context'.⁶⁴ While there is, of course, every possibility that such phrasing leaves scope to think of such duty as an empty gesture, the commitment both to assessing policy proposals for socio-economic impact and the broadness of the definition of socio-economic disadvantage to include various community and locality considerations is worth reflecting on.

Indeed, in relation to the planning and provision of housing, the case study modelled by the Scottish Government guidance incorporates the importance of addressing the location of housing in addition to volume, and explains that consideration of adequate access to public services is a vital part of community creation. As such, it demonstrates an understanding of the link between community, locatedness, and socio-economic need. Given that *Z v Hackney and AIHA* turns on competing needs and senses of home within a community, this is an important point to reflect upon. This contest was resolved on the basis that the court accepted that the socio-economic disadvantages and requirements (such as the importance of close community), alongside the antisemitic abuse faced by Haredim, tied to a protected characteristic was sufficient justification for the positive discriminatory policy of AIHA to only offer accommodation to Orthodox Jews.

Of interest here is the submission on behalf of Z that, while many members of the Orthodox Jewish community have acute housing needs (which, ultimately, led to the court determining that AIHA's policy was permitted by s.158(2) of the Equality Act 2010), 'members of the Orthodox Jewish community did not suffer any relevant disadvantage, or have any relevant need, that was not also shared generally by applicants for social housing in Hackney'.⁶⁵ Indeed, it was additionally pointed out that other applicants to Hackney's allocation scheme may have needs which surpassed these of the Orthodox Jewish community. As such, the question which can be asked is whether, in a world where s.1 of the Equality Act 2010 was enacted, the questions related to socio-economic disadvantage, need, and importance of community, would be justiciable issues in their own right and not only in relation to protected characteristics? If so, against whom?

As mentioned above, this case introduced competing entanglements of material need, on the one hand, and questions of home, belonging, and community attachment, on the other hand. As such, it is insufficient to suggest that the material need of one party outweighed the material need to which the other party was responding to in its discriminating policy. Use of s.1 would circumvent questions relating to s.13, and the need to determine whether or not a co-operating housing association had a justifiable exception to the law, enabling it to discriminate on the basis of a protected characteristic. Rather, at issue would be Hackney's strategic approach to housing. For instance, the stress on a definition of socio-economic disadvantage which includes lack of access to basic goods and services, as well as notions of social exclusion, corresponds with the compound necessity of 'belonging' as a socio-economic right introduced above in the consideration of Arendt and Du Toit and in the indications given by the *Fairer Scotland Duty* guidance.

Of course, one hindrance to any would-be enactment of a socio-economic duty which took in the importance of locatedness and access to services is a housing environment characterised over the last forty years by diminishment of local authority housing stock and by the sustained socio-economic and housing pressures being faced by people requiring support of public services. Indeed, in relation to Hackney, the position is stark:

About 13,000 households are currently registered under Hackney's scheme for the allocation of social housing. In 2016, Hackney allocated only 1,229 properties for social

⁶⁴ Scottish Government (2018) The fairer Scotland duty. 27 March 2018. <https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/>. Accessed 18 February 2020, 17.

⁶⁵ Quoted at [60].

housing. Again, there is no evidence that the imbalance is likely to decrease markedly in the foreseeable future.⁶⁶

It would also be impossible to expect that a commitment to a socio-economic duty would comprehensively and adequately tackle the ideological incursion into social housing which encourages (simulations of) private homeownership and motivates chronic underfunding. However, within this context, and within the context of reliance on co-operating housing associations for service provision, it seems important to ascertain what effects a justiciable socio-economic duty *could* have on housing and planning. In order to do so, we can take Hackney, and the situation in *Z v Hackney and AIHA*, as an example.

It is important to note that Stamford Hill is a large district of Hackney and, as has already been mentioned, all properties which would have been suitable for Z and her family within the area were managed by AIHA. Moreover, in the years relevant to *Z v Hackney and AIHA*, AIHA let 50% of all four-bedroom properties across the borough of Hackney. In light of any potential enactment of a duty to 'when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage,'⁶⁷ a lack of strategy to establish a diversity of stock from providers whose charitable function is to provide for particular groups within a local community could be challenged. Of course, this would only result in a very modest adjustment to housing outcomes and, given the decades of radical shifts in the capacities of local authorities in relation to housing, would be unlikely to result in sharp enhancements in allocations. However, it would gesture towards factoring in the importance of community attachment and social location—the right to belong—more generally, and not just within the confines of establishing legitimate exceptions for those with protected characteristics under the Equality Act 2010.

5. Conclusion

It is impossible to offer an adequate summary of nearly 50 years of housing law bound up in significant changes in policy and attitude. What the above account of changes does is to develop a story of the challenging housing climate, and the severely reduced capacity for local authorities to provide housing to those in need of public support. This account reflects on how much the ideological insistences about privatising and individualising responsibility, and the preoccupation with ownership, are weaved into this legislation. One consequence of both the ideological emphasis on ownership and the increasingly limited capacity of local authorities to satisfy the continued (and, in many cases, growing) demand to support accommodation for those in need is displacement. In relation to the former, this displacement is from the approved political and rhetorical community, and this community is buttressed by legislative enactments. The displacement experienced in relation to the latter is socio-geographical; as demand for housing outweighs available homes, people are prohibited from locations to which they are tied, by family, friends, support, and indefinable senses of attachment. Both displacements are demonstrated in *Z v Hackney and AIHA*. The case turned on the lack of appropriate housing for Z and her family, who are not Haredim, and the contested practice of a co-operating housing association to primarily provide housing only to Haredim.

The resulting decision in favour of Hackney and AIHA meant, of course, that Z was not accommodated in an AIHA home in her local area or near her familial support network. Furthermore, the decision rested on the consideration of a rights framework which does not—yet, or may never—provide for a duty to consider substantial issues of socio-economic disadvantage (including lack of access to services and social exclusions). The case of *Z v Hackney and AIHA* demonstrates that the Equality Act 2010 delimits concessions and

⁶⁶ Quoted at [73].

⁶⁷ s.1 Equality Act 2010, c.15

considerations, which are certainly justifiable, for particular groups on the basis of socio-economic need, but this is not universal. As such, the precarity felt by those displaced from a community which emphasises home ownership as the expression of 'good' citizenship is manifested in the fact that the question of housing obligations and need is referred to the domain of liberal rights and equalities law. In reflecting on the pressing needs of people to have both shelter and a sense of community attachment, and on the demanding funding and policy context for local authorities in relation to housing, this paper concludes with a modest argument that the enactment of a socio-economic duty would, in the very least, ensure that locatedness and belonging are given regard to in strategic decisions about housing development and allocation, making justiciable the need and right to belong rather than entrenching dislocations.